

## **REMARKS**

This Request For Reconsideration is being filed in response to the outstanding Office Action, dated August 1, 2005 in which the Examiner rejected claims 1-6, 8-10, and 12-25, all of the claims currently pending in the subject application.

Applicant notes that an Appeal Brief was filed in the present application on March 11, 2005. Shortly thereafter, the Examiner called Applicant's representative to discuss certain Examiner's Amendments to be made in order to place the claims in condition for allowance. Applicant agreed to the Examiner's suggested changes and was assured that a Notice of Allowance would be issued in due course. The Examiner did not mail an Interview Summary or any other record of the above-referenced conversation. However, to Applicant's surprise, in early August 2005, a non-final office action was received again rejecting all of the claims pending in the application, but this time over a newly cited reference.

Applicant submits that it is not proper procedure for the Examiner to withdraw the final rejection and remove a properly filed Appeal from the Appeal docket in order to cite a new subsidiary/cumulative reference. M.P.E.P. 706.07(e) states, in relevant part:

Although it is permissible to withdraw a final rejection for the purpose of entering a new ground of rejection, this practice is to be limited to situations where a new reference either fully meets at least one claim or meets it except for differences which are shown to be completely obvious....

The practice should not be used for application of subsidiary references, or of cumulative references, or references which are merely considered to be better than those of record.

Applicant would not have agreed to the Examiner's proposed amendment, if he had known that the Examiner would perform yet another search and apply a merely cumulative reference. After five years of prosecution and numerous non-final office actions, Applicant believes that he is entitled to have the present application allowed or finally rejected so that an Appeal may be taken.

### **Rejection Under 35 U.S.C. § 103(a)**

The Examiner has rejected claims 1-6, 8-10, 12-19, and 25 of the present application under 35 U.S.C. § 103(a) over U.S. Patent No. 6,233,565 to Lewis in view of Reynard (WO

00/02150). The Examiner also rejected claims 20-24 over Egendorf in view of Reynard and Walker et al. Applicant respectfully objects to the Examiner's continued use of Lewis and Egendorf as base references given the Applicant's arguments set forth in the Appeal Brief, filed March 11, 2005, and the Examiner's removal of the present application from appeal. Applicant submits that he has adequately addressed and overcome said references.

Nevertheless, the current rejections, which rely upon the Reynard reference, are traversed. Reynard is a PCT publication dated January 13, 2000. The present application claims priority to U.S. Provisional Appln. Serial No. 60/157,774, filed on October 5, 1999, and thus has a priority date earlier than the effective date of the Reynard reference. Reynard is thus not properly cited as prior art against the present application.

Applicant's representative contacted the Examiner telephonically in an attempt to have the Reynard referenced removed as a reference to the present application. Applicant's representative explained that because the present application claims priority to U.S. Provisional App. No. 60/157,774, filed October 5, 1999, the Reynard reference was not prior art to the present application under 35 U.S.C. §§ 102, 103. In response, the Examiner requested that Applicant file a written response to the outstanding office action.

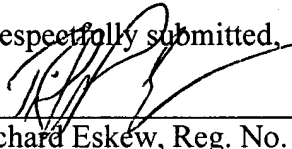
Under 35 U.S.C. §§ 102, 103, in order to be considered prior art, an international application filed prior to November 29, 2000 must have publication date either prior to the date of invention of the subject application (35 U.S.C. §§ 102(a)), or have an effective filing date more than one year prior to the date of the application for the subject application (35 U.S.C. §§ 102(b)). *See* M.P.E.P. §§ 706.02(a) and 2136.03. The Reynard reference fulfills neither of those requirements, because the earliest effective date that Reynard can claim is January 13, 2000 (the international publication date), which is subsequent to the provisional priority date of October 5, 1999 of the present application. Because Reynard is not properly cited as a reference against the present application, Applicant respectfully submits that the obviousness rejections based on Reynard be withdrawn.

### **Conclusion**

Applicant has made a diligent effort to place the Application in condition for allowance and respectfully submit that claims 1-6, 8-10, and 12-25 in light of the arguments set forth above are in condition for immediate allowance. Consequently, if the Examiner cannot issue immediate Notice of Allowance, the Examiner is respectfully requested to contact the undersigned attorney to discuss the outstanding issues.

Any new and additional fees or charges beyond which are stated in said transmittal letter filed concurrently herewith should be charged to Deposit Account No. 19-4709 as necessary.

Respectfully submitted,



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